United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1345

ARGUED BY:

ROBERT RIVERS

B P/S

APPEAL NO. 74 CR 765

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT: NEW YORK

UNITED STATES OF AMERICA,

- against-

DOMONICK SEMINARA,

Defendant-Appellant.

APPELLANT'S BRIEF

ON APPEAL

Submitted By,

TO:

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STATEMENT

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York on the 14th day of July, 1975.

Defendant, DOMINICK SEMINARA, was jointly tried with STEPHEN LENT under Title 18 U.S.C. 1341 and 2 and they were found guilty by jury on all counts of the indictment. Defendant was sentenced to a period of two (2) years and fine $1,000.00.

The basis of this appeal is that on the 9th day of December, 1974, the Federal Grand Jury of the Eastern District of New York in Brooklyn indicted DOMINICK SEMINARA and STEPHEN LENT under Title 18 U.S.C. 1341 and 2. The indictment invariably stems from the operation and organization of FOTO FACTORY by defendants.

The indictment alleged that on or about and between September 15, 1973, and October 30, 1973, the defendants above-named devised a scheme to defraud certain credit card holders and in furtherance of the scheme, defendants

fraudulently caused to be prepared and sent through the mail, envelopes for film processing to certain credit hard holders without disclosing that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the prepaid processing mailers.

Notice of appeal from the judgment of conviction was timely filed on October 19, 1975, with due notice to the United States Attorney.

The United States was represented by HAROLD FRIEDMAN and CHERYL SCHWARTZ.

The defendant, DOMINICK SEMINARA, was represented in the court below by the firm of ROBERT RIVERS. Appellant is represented on this appeal by the firm of ROBERT RIVERS.

QUESTIONS PRESENTED

(1) Whether the acts charged under the indictment and the facts established by the Government at the trial constitute an offense within the meaning of Section 1341 and 1342 of U.S.C?

(2) Whether the failure of the trial court to entertain a motion for discovery constitute a prejudicial error as to deprive defendant-appellant's right to a fair trial?

(3) Whether the State conviction of the appellant which pre-existed the Federal indictment constitute double jeopardy thereby preventing a trial on the same facts before the Federal courts?

(4) Whether the admission of copies of envelopes and mailers without any indication as to the whereabouts of the original constitute a reversible error?

(5) Whether the failure of the Government to establish appellant's guilt to each and every individual count through testimony of persons named in each count constitute reversible error?

BACKGROUND AND FACTS

In July, 1972, appellant, together with STEPHEN LENT, MICHAEL LENT and NICHOLAS MASCARA, formed a corporation known as FOTQ FACTORY, INC. The concept behind the formation of said corporation was the need for an enterprise that dealt directly with the public, through mail orders, in the sale of film, processing and development. Appellant and STEPHEN LENT were vested with control of the advertising program. NICHOLAS MASCARA was in charge of the laboratory and MICHAEL LENT handled general administration and bookkeeping. The aforementioned persons including appellant were the officers and directors of the corporation.

The bulk of the business of FOTO FACTORY, INC. revolved around mail orders. Through nationwide advertising, FOTO FACTORY, INC. offered for sale to the public, at extremely low prices, a "mailer" which contained film and self-addressed envelope. The self-addressed envelope was for use by the purchaser to return the film to FOTO FACTORY, INC. for development after pictures had been taken.

As this phase of the business of FOTO FACTORY, INC. developed, many purchasers of "mailers" would use their credit cards, such as Master Charge and Bank Americard to pay for the purchase price. This was done by notifying FOTO FACTORY of the purchasers credit card number. A slip charging the card holder would be prepared and presented to one of the banks that honored that particular credit card.

The merchandising campaign sponsored by FOTO FACTORY was an offer of a "mailer" that had a value of $22.00 but was offered to the public at a low price of $9.95. While the margin profit to FOTO FACTORY was extremely small, it was expected that large volume of sales would generate a substantial profit.

As part of the merchandising campaign, it was decided to offer the low priced "mailer" first to former credit card customers. This was done by first shipping the "mailers" to previous credit card customers and informing that they had "A MONEY BACK GUARANTEE." After the "mailers" were shipped, a charge slip was prepared

on the credit card holders' number and presented to a bank that honored that credit card. As in the past, the bank deposited the amount of the purchase price to the account of FOTO FACTORY, INC. and from time to time the funds were transferred to FOTO FACTORY's account with Franklin National Bank.

By the end of September, 1973, it became obvious to appellant that there had been a serious miscalculation. A substantial number of persons who had received the "mailers" objected to having their credit cards charged with the purchase price of $9.95. These people notified Master Charge or Bank Americard that they would not accept the charge to their credit cards. In turn, the particular bank would then charge back the amount to FOTO FACTORY's account. Unfortunately, payments to meet pressing obligations of said FOTO FACTORY had reduced the balance in the Franklin National Bank account to a few dollars.

While this problem was developing, FOTO FACTORY was experiencing difficulties with the office of the Attorney General of the State of New York, the District Attorney's Office of Nassau County and the Consumer Affairs Department of Nassau County.

In the midst of all the financial difficulties, the creditors obtained default judgment against FOTO FACTORY, INC. and through the Office of the Sheriff of Nassau County sought levy and execution. In November, 1973, the Sheriff of Nassau County seized the property of FOTO FACTORY, INC. and closed down its offices and laboratory. Consequently, appellant, together with his partners, filed voluntary petition of bankruptcy.

Despite the bankruptcy, appellant felt he had an obligation to the people who had accepted the charge for the "mailer" and wanted their film processed and developed. Therefore, appellant sought permission from the Bankruptcy Court to continue the operation of FOTO FACTORY, INC. Referee RUDIN approved appellant's application and he and MICHAEL LENT deposited $12,000.00 to meet the cost of developing and processing. The Post Office Department and the Office of the Attorney General of the State of New York opposed the application and the referee, RUDIN, refused to permit the release of any more mail sacks. Consequently, there were more charge backs on credit cards and a problem that could

have been resolved with little or no harm to the public or loss to the banks involved was exacerbated. The arbitrary attitude of the Post Office Department and the Office of the Attorney General of the State of New York contributed significantly to the misunderstanding which precipitated the within proceedings.

POINT ONE

THE ACTS CHARGED TO THE APPELLANT DO NOT CONSTITUTE MAIL FRAUD

The United States Code, Section 1341 and 2 provides

> "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false pretenses or fraudulent pretenses, representations, or promises, . . . shall, for the purpose of executing such a scheme or artifice or attempting to do so, place in any post office or authorized depository for mail, any matter or thing, whatever to be sent or delivered by the Post Office Department... shall be fined not more than $1,000 or imprisoned not more than five years or both."

The offense defined by this statute consists of two essential elements: (1) The existence of a scheme to defraud, and (2) the placing or causing to be placed in the Post Office of a letter, postal card or other mailable matter for the purpose of executing or attempting to execute the scheme. FOURNIER v. U.S., 7 Cir, 58 F 2d 3, 5; WOLDA v. U.S., 8 Cir. 86 F 2d 35, 40; U.S. v. YOUNG, 232 U.S. 155, 34 S.Ct. 303, 58 L.Ed. 548; ROBINS v. U.S., 8 Cir. 262 F 126.

In DALTON v. U.S., 127 F 544, the Circuit Court of

Appeals for the Seventh Circuit, dealing with said Section 1341, held that an indictment under that section must not only charge the devising of a scheme or artifice to defraud, to be effected by using the mail, but must set out the facts which constituted the specific scheme or artifice so charged by the defendant. In SAVAGE v. U.S., 270 F 14, the court said:

> "The particulars of the scheme are matters of substance; and must be set forth with sufficient certainty .. to .. acquaint the defendant with the charge against him."

In short, the indictment or information must be specific in its charges and necessary allegations cannot be left to inference. RUSSELL v. U.S., 1962, 82 S.Ct. 1038, 369 U.S. 749, 8 Lt. Ed. 2d 240. The acts and intent that make up the crime should be set forth in the indictment or information with reasonable particularity of time, place and circumstances. U.S. v. CRUISKSHANK, 1876, 92 U.S. 542, 558, 23 L.Ed. 588.

It is the contention of the defendant, DOMINICK SEMINARA, that the charges brought against him do not constitute any crime against the United States; charge

a scheme to defraud by certain false pretenses but with no conformable negation of the pretenses alleged; do not contain any allegation that the false pretences were made with the intent that they should be acted upon to the damage of the persons to whom they were made; contain no allegations that persons to whom it was alleged the pretenses were made believed them to be true or relied upon them.

In order to appreciate the contention of the defendant, it is significant to note the charges brought against defendant during the trial. It was alleged by the government that on or about September 15, 1973, and October 30, 1973, the defendant with others knowingly devised and intended to devise a scheme and artifice to defraud certain credit card holders throughout the United States by means of false and fraudulent pretenses, well knowing at the time that the pretenses and promises would be false and fraudulent when made. It was further alleged, that it was part of the scheme and artifice to defraud that defendants caused to be prepared and sent through the mail envelopes for film processing disignated

"Prepaid Processing Mailer" to certain cardholders. The alleged false representation consisted of the following written statements made by the defendant:

MONEY BACK GUARANTEE

Enclosed is your assortment of prepaid Foto Factory mailers. One for 12 exposures color film, 2 for 20 exposures color film and one for 20 exposures slide film or super 8 movie film.

When you are ready to develop your film, simply fill out name and address and enclose film - send no money, these are prepaid mailers.

We are certain you will enjoy dealing direct with Foto Factory. Be sure not to lose or destroy these mailers. They are worth $22.10.

It was further alleged that defendant omitted and concealed from the written statements sent to customers the fact that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of the prepaid processing mailers.

The main question that has to be determined is whether the defendant at some time prior to the mailing of the said "Prepaid Mailer" had in mind any intention to defraud their customers to whom they were sent.

Repeated readings of the indictment and transcripts of the trial have failed to reveal to this writer in any apt or certain language the facts of the scheme or artifice described in the indictment. There was nothing at the trial to indicate any scheme or artifice by the defendant. The only paragraph of the indictment which could be contended as remotely bearing upon such a particular scheme is paragraph 6 of the indictment which set forth the alleged false representation. It was alleged in said paragraph and contended by the prosecution during the trial that it was part of the scheme to defraud that the defendant omitted from the said written statement the fact that each account of the credit card holders was being simultaneously charged $9.95.

It is very interesting to note at this juncture that there was no indication in the alleged representation that the mailers were being sent free to the customers. As a matter of fact, it was sufficiently indicated

to the customers to whom the mailers were sent that no money should be sent, "THESE ARE PREPAID MAILERS." Nevertheless, the fact that defendant did not state the particular form of payment does not itself constitute false representation. There were no false statements in the "Prepaid Mailers" sent out and the absence of a false statement in the said mailers negates any charge of fraud. Thus, giving to the language of the statute a sensible construction, it is the considered opinion of this writer that the indictment upon which conviction was obtained charges no scheme to defraud by means of false pretenses.

In any prosecution for violation of mail fraud statutes, it is the burden on the government to prove that the defendant had an intent to defraud. Intent to defraud is an essential element of mail fraud. U.S. v. SPARROW, 470 F 2d 885 S.Ct. 1913, 36 L.Ed. 2d 397 (1972). As was held in U.S. v. REESE, 95 F. Supp. 913 (D.C. Pa. 1951) "under mail fraud statute, defendant need not have profited from his scheme in order to have violated the law, but he must have intended to deprive his alleged victims of something of value".

The defendant, DOMINICK SEMINARA, herein did at no time have such an intent to defraud and the government failed to prove any intention to defraud during the trial. The "Prepaid Mailers" ($9.95) upon which the violation is based was alleged by the government to have been mailed to 50 customers who had previously purchased from the company. The "prepaid mailer" offer consisted of four (4) prepaid photo envelopes with a value of $22.10 but sold at $9.95. The officers including defendant herein wereat all times willing to service their customers. In fact, all the customers who did not want the merchandise obtained refunds from the company. The only problem arose when the postal authorities seized certain sacks of mail and returned the mailers to the customers even though the company officers agreed to process the film.

What we conclude with therefore is that there was no intent to defraud at all, only a dissatisfied consumer left with undeveloped film because of the interference of governmental authorities. At all times, the defendant herein and others were ready, willing and able to

remedy this unfortunate incident which, if anything, was only a poor business judgment and nothing more. The defendants at all times pursued a policy which included refunds to customers who did not request the merchandise or who were dissatisfied with it. As it was held in STATE v. HARRIS, 313 S.W. 2d 664, 670 (Sup. Ct. Mo. 1958):

> "An intent to defraud indicates a purpose or design to deprive someone of lawful right, enterest, or property by fraudulent means and is inconsistent with an intent to return property to its owner."

Additionally, it was held in HARRISON v. U.S., 200 F 662, 670 (6th Cir. 1912) where literature cited that refunds would be given if customers were dissatisfied with purchased vacuum cleaners that:

> "The promise to refund the purchaser's money if made in good faith and taken in connection with the literature here used could leave no room for the conclusion that the scheme upon the whole was one of defraud."

Furthermore, the government ought to have proved beyond reasonable doubt that some actual injury or harm was contemplated by defendants. It is not enough merely to show an intent to deceive, U.S. v. REGENT OFFICE SUPPLY CO., 421 F 2d 1174 (2nd Cir. 1970). The purpose

of the scheme must be to injure. HORMAN v. U.S., 116 F 350 (6th Cir. 1902).

In the case of REGENT OFFICE SUPPLY CO., (supra), the defendants while being prosecuted for violating 18 U.S.C 1341 went so far as to offer a stipulation showing that false representations were made and that they were made by defendants' agents with knowledge of their falsehood. The sequence of the transaction of which the untrue statements were an incidental part thereof was the transfer of money and property. In dealing with the stipulation, the court said,

> "an intent to deceive, and even to induce, may have been shown, but this does not without more constitute the 'fraudulent intent' required by the statute " at page 1181.

It is clear that in the present case there could not have been any harm contemplated for the value of the processed mailers was substantially more than $9.95. As pointed out in U.S. v. REGENT OFFICE SUPPLY CO. (supra) at page 1181:

> "If there is no proof that the defendants expected to get 'something for nothing', HARRISON v. U.S., 200 F 662 (6th Cir. 1912) or that they

> intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendant's falsehood."

There is no question that the defendant was transferring to every customer valuable mailers for which the consideration received by the defendant could not be called anything but reasonable.

It thus appears that while the government might have succeeded in establishing the existence of probably an iniquitous arrangement whereby defendants who were officers of the said Foto Factory were to receive the price of their services by charging the account of credit card holders, the government absolutely failed to prove beyond reasonable doubt the existence of the alleged scheme to defraud charged in the indictment. The scheme charged was one to obtain money by false representations from the credit card holders. The only false representation proved at the trial was to the effect that the credit card holders did not know how the defendants were going to be paid. There was no representation to that effect. The evidence conclusively shows that what the defendants did, and what they intended to do, was to refrain from

disclosing how they were going to be reimbursed. Whether the breach of trust which the defendants, who were officers of the Foto Factory, might have been guilty in not disclosing what it was their duty to disclose is a crime for which they could be punished is a different matter; but to conclude that such a non-disclosure constitutes an offense under Section 1341 and 2, Title 18 U.S.C. is a conclusion which has no support either in law or in fact.

Further, it must be pointed out that to sustain an indictment under 18 U.S.C. Section 1341 and 2, there must be a prima facie evidence of a connection between the mailing and the scheme to defraud. Under the statute, the mailing must be "for the purpose of executing the scheme as the statute requires." KANN v. U.S., 323 U.S. 88, 94. In KANN (supra, corporate officers and directors were accused of having set up a dummy corporation through which to divert profits of their own corporation to their own use. As a part of the scheme, the defendants were accused of having fraudulently obtained checks payable to them which were cashed or deposited at a bank and

then mailed for collection to the drawee bank. The court held that the fraud was completed at the point at which defendants cashed the checks.

> "The scheme in each had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. It cannot be said that the purpose of executing the scheme, as the statute requires.

323 U.S. at 94.

In this instant case, assuming without conceding that there was a scheme to defraud which was not, the fact still remains that the alleged scheme to defraud had nothing to do with the mailing of the "pre-paid mailers" in that the defendants had the list of the names of the customers before the mailing was done and therefore could have defrauded the customers without mailing; consequently, the mailing of the prepaid mailers did not add any new element to the alleged scheme to defraud and had no connection with it.

It is respectfully submitted that the facts proved at the trial did not constitute any offense under the

statute, and further, the mailings were not related to the alleged scheme to defraud so as to bring defendant's conduct within the meaning of the statute.

POINT TWO

THE FAILURE OF THE TRIAL COURT TO ENTERTAIN A MOTION FOR DISCOVERY WAS TANTAMOUNT TO A DEPRIVATION OF DEFENDANT'S RIGHT TO FAIR TRIAL AND CONSTITUTE PREJUDICIAL ERROR

One of the most remarkable innovations wrought by the enactment of Rule 16 of Federal Rules of Criminal Procedure is the codification of the pre-trial discovery in criminal cases. Discovery in criminal cases is a recent and fast moving development. In 1927, CHIEF JUDGE - later JUSTICE - BENJAMIN CARDOZO spoke of the power of "courts of criminal jurisdiction to compel the discovery of documents in furtherance of justice" but could discern only "the beginning or at least the glimmerings of such a doctrine...."

Discovery, as encompassed in Rule 16 of the Federal Rules of Criminal Proceeding was amended in 1966 in response to an increased awareness of the necessity and desirability of discovery in criminal cases. As the United States Supreme Court stated in DENNIS v. U.S., 384 U.S. 855:

> "There is a growing realization that disclosure, rather than

> suppression, of relevant materials ordinarily promotes the proper administration of criminal justice... In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a store house of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling consideration."

And the Supreme Court Advisory Committee which drafted the Amendments to Rule 16 stated:

> "To the extent to which pre-trial discovery should be permitted in criminal cases is a complex and controversial issue. The problems have been explored in detail in recent legal literature most of which has been in favor of increasing the range of permissible discovery... The rule has been revised to expand the scope of pre-trial discovery."

Under Rule 16(a) the court may, upon motion of the defendant, permit him to inspect and to copy or photograph: (1) his own "written or recorded statement or confession" in the possession of the Government, which is either known, or may become known by due diligence, to the prosecutor; (2) "results or reports of physical or mental examinations and scientific tests or experiments made in connection with the particular case," in the possession of the Government;

and (3) the defendant's own recorded testimony to the Grand Jury.

In a construction of Rule 16 (a) (1), the court in U.S. v. PROJANSKY, 44 F.R.D. 550, Southern District of New York stated:

> "Defendants should routinely be given documents like those here in question, without any special showing of any kind, unless the Government can demonstrate some particularized and substantial reasons why this should not be allowed in a particular case."

This ruling was cited with approval in UNITED STATES v. ISA, 413 Fed. 2nd 244. In U.S. v. TANNER, 279 Fed. Sup. 457, the court stated, "the moving defendants are entitled to inspect or copy their own recorded testimony before the Grand Jury, if any." And, in U.S. v. BURGIO, 279 Fed. Sup. 843, it was held that "the defendant....is entitled to a copy of any written statement or confession made by him. This is in line with the liberalized discovery policy behind the amendment to Rule 16, Federal Rules of Criminal Procedure," citing UNITED STATES v. GLEASON, 259 Fed. Sup. 282. This was qualified somewhat by the decision in UNITED STATES v. AADAL, 280 Fed. Sup. 859, where it was held that:

> It is evident that granting discovery of defendant's confession or statements

that are in possession, custody or control of the Government, is within the trial judge's discretion."

This is a decision of the District Court of the Southern District of New York which generally requires a showing of "cause" by a defendant seeking discovery of his own statements, U.S. v. LOUIS CARREAU, INC., 42 F.R.D. 408; U.S. v. WALLACE, 272 Fed. Sup. 838. This court has generally restricted discovery to cases where there is a showing "that such disclosure would be in the interest of justice under the circumstances of a particular case." It should be noted that this is minority view and that the majority of the courts adhere to the principle enunciated in U.S. v. PROJANSKY (SUPRA) that discovery "should routinely be given."

The courts, however, have evolved certain principles in the construction of Federal Rule 16 (a) (1):

"(1) The contents of the statement may be either inculpatory or exculpatory; it need not be a confession or an admission of elements of the offense. It is sufficient that the statement is relevant to the crime charged. (UNITED STATES v. FEDERMAN, 41 F.R.D. 339.)

(2) The statement need not be made to an agent of the Government. Any statement, to whomever made, is discoverable if it otherwise is within the Rule. (U.S. v. LUMBOMSKI, 277 Fed. Sup. 713; U.S. v. BAKER, 262 Fed. Sup. 657, remanded for hearing on other grounds, 401 Fed. Supp. 958; U.S. v. KNOHL, 379 Fed. Sup. 427 cert. denied 389 U.S. 973.)

(3) The statement need not be made after the arrest of the defendant. If it is otherwise within the rule, it is discoverable when made. (U.S. v. LEIGHTON, 265 Fed. Sup. 227; U.S. v. ISA, 413 Fed. 2d 244.)

(4) The statement need not be written out by the defendant or be a written document signed by him. "An oral statement recorded by mechanical, electrical or other means is discoverable....' (Advisory Committee Note to Rule 16 (a) (1); UNITED STATES v. LUMBOMSKI (SUPRA); UNITED STATES v. BAKER (SUPRA).

(5) An oral statement of a defendant, recited or summarized in an investigative report or the notes of a Government investigator report or the notes of a Government investigator, appears to be discoverable under Rule 16 (a) (1), without regard to whether it is verbatim or substantially verbatim or when the report or notes were made." (UNITED

STATES v. MORRISON, 43 F.R.D. 516; UNITED STATES v. PILNICK, 267 Fed. Sup. 791; UNITED STATES v. REID, 43 F.R.D. 320; UNITED STATES v. KAGUIAMA, 252 Fed. Sup. 284; UNITED STATES v. CURRY, 278 Fed. Sup. 508; UNITED STATES v. SCHARF, 267 Fed. Sup. 19 and UNITED STATES v. KUPERBERG, 288 Fed. Sup. 115). (Criminal Defensne Techniques by Cipes, Page 10-9 and 10-10.)

In the case at bar, before the trial commenced, defense counsel, ROBERT RIVERS, ESQ., requested an adjournment (see Page 18 of the transcript) in order to make a motion to discover certain materials which were essential to the preparation of the defense case. One of these materials was a letter written by the defendant explaining to the Federal Trade Commission the actions he had taken with regard to customers. To prepare his case for trial, the defendant must have had an access to the letter which was in sole and exclusive custody of the prosecution. The information contained in the said letter together with other testimony before the Attorney General and Consumer Affairs Department was very crucial to defendant's innocence or guilt. But instead of the court granting the

adjournment requested by the defense for the purpose of discovery, the court denied defendant's request by contending that defendant "has no right to ask for that kind of adjournment." (See Page 43 of the transcript) and compelled defendant to proceed to trial. Consequently, defendant was denied due process of law and the fundamental right of fair trial.

POINT THREE

OUR SYSTEM OF JUSTICE DICTATES THAT NO PERSON SHALL BE PLACED IN JEOPARDY MORE THAN ONCE FOR THE SAME OFFENSE

The designation of the term jeopardy, with relation to its use in criminal prosecution, means exposure to danger. Common law rule dictates that no person shall be placed in jeopardy more than once for the same offense and this principle of law has been embodied in both the Federal Constitution, as well as the Constitution of several states of the nation. The Federal Constitution guarantees this right against Federal action in these words of the Fifth Amendment; "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The doctrine was evolved not only to prevent an accused from being twice punished for the same offense, but also to prevent the accused from being tried twice for it. The purpose of the prohibition, as stated in GREEN v. UNITED STATES, 355 U.S. 184, "is that the state with all its resources and power should not be allowed to make repeated attempts to convict an individual of an alleged

offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty."

75 Yale Law Journal, 262 (1965), states in a Note:

> "In its traditional application, double jeopardy is a rule of finality; a single fair trial on a criminal charge bars reprosecution. Double jeopardy shares the purpose of civil law rules of finality; it protects the defendant from continuing distress, enables him to consider the matter closed and to plan ahead accordingly, and saves both the public and defendant the cost of redundant litigation... The double jeopardy bar on a reprosecution after an acquittal makes the statute of innocence meaningful and minimizes the chance that innocent men will be convicted.... Finally and most importantly, rules against reprosecution, after either prior acquittal or prior conviction, prevent the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendant.... The constitution allows this ordeal to be imposed only once and for reasonable cause, not repeatedly at the prosecutor's whim."

The test by which a plea of double jeopardy is determined is whether, if what is set out in the second indictment had been proved under the first, it would have supported a conviction, and if, it would, the second indictment cannot be maintained. UNITED STATES v. CLAUS, D.C.N.Y. 1937, 19 F. Sup. 435. In other words, the Fifth Amendment guarantees that when the Government has proceeded to judgment on certain fact situation there can be no further prosecution of that fact situation alone, and defendant may not later be tried again on that same fact situation where no significant additional fact need be proved, even though he be charged under different statute. Therefore, the principle behind double jeopardy provision of the Fifth Amendment is that a person acquitted or convicted of criminal offense on merits shall not be prosecuted a second time for the same offense. UNITED STATES v. GRAMER, 191 F. 2d 741, 27 ALR 1132. It requires an offense identical both in law and fact and covers conviction as well as an acquittal. UNITED STATES v. DODGE SEDAN, 113 F. 2d 552.

In the instant case, defendant-appellant and other co-defendants and the corporation of which they were

officers were, on December 18, 1973, indicted by Nassau County Grand Jury for grand larceny in the second degree, eight counts of forgery in the second degree, eight counts of criminal possession of forged instruments in the second degree and falsifying business records in the first degree. On December 31, 1974, the defendant-appellant was again indicted by the said Grand Jury for grand larceny in the second degree, nine counts of forgery in the second degree, criminal possession of a forged instrument in the second degree and falsifying business records in the first degree and conspiracy in the third degree.

On January 13, 1975, the defendant-appellant withdrew his original plea of not guilty in the County Court, Nassau County, before HONORABLE ALPHONSO LA PERA under the first indictment and entered a plea of guilty.

The Federal Grand Jury of the Eastern District of New York in Brooklyn, on the 9th day of December, 1974, indicted the above-named defendant-appellant under Title 18 U.S.C. 1341 and 2. The basis of the Federal indictment is that on or about and between September 15, 1973, and October 30, 1973, the defendants devised a scheme to defraud certain credit card holders and in furtherance of the scheme, defendants fraudulently

caused to be prepared and sent through the mail, envelopes for film processing to certain credit card holders without indicating that each account of the credit card holders was being simultaneously charged $9.95 with the mailing of each of the "prepaid processing mailers." The said indictments, however, both the Federal and the State stem from the operation and organization of said FOTO FACTORY by the defendants and, further, both indictments are basically connected with the said "prepaid mailers" sent out by the officers of the said FOTO FACTORY of which defendant-appellant is one.

It is strongly urged that since defendant-appellant, together with others, have been convicted and sentenced in the County of Nassau and since the facts and occurrence in the said indictment in the County of Nassau formed the basis of the within indictment in that the time, place of occurrence and transaction are the same and, further, since the offenses charged are identical both in fact and law. Defendant-appellant's conviction under the indictment in Nassau County is a bar to prosecution under

the Federal Indictment.

Although the Federal and State courts have different jurisdiction and therefore the concept of double jeopardy does not operate in the technical sense of the word, nevertheless, to allow defendant-appellant to be convicted twice for the same conduct based on the same facts do not only constitute travesty of justice but it does not accord with our sense or concept of justice. Therefore, in the interest of justice and in fairness to the defendant-appellant, this writer strongly urges the Court to overturn the decision of the lower court.

POINT FOUR

THE ADMISSION OF COPIES OF ENVELOPES AND MAILERS WITHOUT ANY INDICATION AS TO THE WHEREABOUTS OF THE ORIGINAL CONSTITUTE A REVERSIBLE ERROR

As understood and applied in present day practice, the best evidence rule requires that whenever a party seeks to prove the contents of a writing, he must produce the original writing or satisfactorily account for its absence. RICHARDSON ON EVIDENCE NINTH EDITION.

WIGMORE sums up the reasons for the rule thereby:

> "As between a supposed literal copy and the original, the copy is always liable to error on the part of the copyist, whether by willfulness or inadvertence; this contingency wholly disappears when the original is produced... (WIGMORE ON EVIDENCE, THIRD EDITION, Sec. 1181)

WIGMORE also notes that the rule is applicable to all kinds of writings:

> "The original doctrine...affected only records and instrument under seal, and applied in civil cases only; but by gradual development... the rule requiring production in evidence came to be settled as including in its scope any and every kind of document, from a record or

> a dead letter or a memorandum, and as applicable equally in criminal and in civil cases."

WIGMORE, id, Section 1183.

In general, all competent evidence tending toward ascertainment of the truth should be produced, and the court should take such action as will tend to bring evidence before it. U.S. ex rel DREW v. MYERS (1964, CA 3 Pa), 327 F 2d 174 cert. den. 379 U.S. 847, 85 S.Ct. 88.

WIGMORE further tells us that:

> "The essential principle of preferred evidence is that it is to be procured and offered if it can be had... The thought here is not that a certain kind of evidence is absolutely necessary but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon... In strictness, no doubt, a destruction signifies that the thing no longer exists, while a 'loss' signifies merely that it cannot be discovered. Nevertheless, for practical purposes, the two come together for consideration in this rule. In the first place, the moment that the destruction becomes questionable at all (i.e. when not proved by eyewitness of a burning or tearing), the inquiry is raised

> whether the search for it has been sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found had ceased to exist and thus assimulate the case to one of destruction."

WIGMORE ON EVIDENCE, THIRD EDITION Sections 1193 and 1194.

In KEARNEY v. MAYOR OF NEW YORK, 92 N.Y. 617, the plaintiff attempted to show that certain vital writings were lost after the defendants insisted on the production of the writings as required by the best evidence rule. The court found the proof of loss inadequate and excluded testimony as to the contents of the disputed paper, stating:

> "The general rule is that the party alleging the loss of material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him."

But, WIGMORE makes clear,

> "that there is not and cannot be any universal or fixed rule to test the sufficiency of the search for the document alleged to be lost. The inquiry

must depend entirely on the circumstances of the case."

WIGMORE, id, Sec. 1194. Thus the evidence of a document being lost, upon which secondary evidence may be given of its contents, may vary very much, according to the nature of the paper itself, the custody it is in and indeed all the surrounding circumstances of the particular matter before the court and jury. FREEMAN v. ARKELL, 2 B and C 494.

But where a document is lost or destroyed, some other acceptable evidence must be adduced to prove the contents thereof. However, secondary evidence of a document can not be adduced unless a proper foundation is first laid for the evidence. Thus in LIEBERMAN v. BALTIMORE & OHIO RAILROAD CO., 115 N.Y.S. 1034 (which is a state case and relevant to issue of offering a secondary evidence) the Appellate Court of the State of New York concluded that no foundation was laid for the introduction of secondary evidence and reversed the judgment.

Thus in the case at bar, it is the contention of defendant-appellant that the Xerox copies of envelopes

in connection with mailers should not have been permitted in evidence. These consisted of Government's "Exhibit 3, 6, 7, 10, 11, 12, 14, 16, 18, 19, 20-A, 20-B, 21, 24, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 39, 30, 31, 45, 47, 48" and "50." These Xerox envelopes were admitted into evidence without the Government indicating the whereabout of the original envelopes. Before their admission into evidence, the following ensued. (See page 480 of Transcript.)

"MR. RIVERS: Objection.

THE COURT: No, no, don't keep on objecting.

MR. RIVERS: I excepted. Now I'm objecting.

THE COURT: That's enough. I ruled on that. There is going to be admitted in evidence. You've got your protection, whatever it is. We can't take that kind of time. Proceed."

Furthermore, the Government offered in evidence the following Xerox copies of envelopes that were not legible. Government's "Exhibits 15, 17, 22, 23, 30, 32, 38, 42, 43, 44"and "46."

The defendant objected to the above Xerox copies being admitted into evidence unless "the blue slip were removed and the envelope submitted with all the writing which appears to be from the person who received it." (See page 1324-1325 of the Transcript.)

"THE COURT: Let me see it.

MR. LENT: I think it would be unfair otherwise because it only gives a partial story.

THE COURT: No, I do not think so at all. It has only been offered that it was mailed out. I think this is simply confusing."

Thus as pointed out by the court, the Xerox copies were offered by the Government to establish mailing by the defendant. But, unfortunately, there was nothing on it to indicate that they were mailed.

On page 1328 of the Transcript, the following ensued:

"MR. RIVERS: In Addition, the rule of evidence speaks about photostats, these are not photostats, these are different.

THE COURT: They say copies of. I am not worried about that, that is a technical matter.

MR. RIVERS: This does not say meters. This one you can't tell if it is an envelope.

MR. LENT: There is no meter number at all, there is nothing on it and another and another one, nothing, nothing.

THE COURT: Let us separate them. This is not exactly nothing."

MR. RIVERS: You cannot tell that these are mailed items."

It must be noted that primary evidence of the contents of the document is the document itself. But where a document is lost or destroyed, some other acceptable evidence must be adduced to prove the contents thereof. However, secondary evidence of a document cannot be adduced unless proper foundation is first laid which the Government failed to do, thereby rendering the Xerox copies inadmissible. Further, secondary evidence, before it would be admitted, must at least be legible. Most of the Xerox copies of the envelopes admitted into evidence were illegible.

Upon the foregoing, this writer respectfully submits that the District Court committed prejudicial error in admitting the Xerox copies into evidence.

POINT FIVE

THE FAILURE OF THE GOVERNMENT TO ESTABLISH APPELLANT'S GUILT TO EACH AND EVERY INDIVIDUAL COUNT THROUGH TESTIMONY OF PERSONS NAMED IN EACH COUNT CONSTITUTE REVERSIBLE ERROR

There has been few attempts in our legal history to define a "count." The Court of Appeal of the Third Circuit offered this definition:

> "The word 'count' is used where, in one finding by the grand jury, the essential parts of two or more separate indictments, for crimes apparently distinct, are combined."

DE JIANNE v. U.S., (1922, CA 3 N.J., 282 F 737, 741.

Indictments may contain several counts for two reasons. First, separate and distinct offenses may be charged in the same indictment or information to avoid the burden of several trials. Second, the same offense may be charged in various ways in different courts, in order to meet the evidence which may be presented at the trial, so as to avoid an acquittal by reason of any unforeseen lack of harmony between allegation and proof. JUSTICE FIELD in a dissenting opinion objected to setting forth numerous offenses in a single indictment:

> "And indictments, in my opinion, ought not be viewed with favor which, by the very multitude of their counts, serve to embarrass and confuse the accused. If an offense cannot be stated in less than one hundred counts of an indictment, I do not think that public justice will suffer if the indictment be dismissed."

EVANS v. U.S. (1894), 153 U.S. 584, 595, 607, 38 Led. 830, 14 S.Ct. 934. However, the Supreme Court saw no objection to an indictment containing 119 counts; (U.S. v. BRITTON (1883), 107 U.S. 655, 656, 27 Led. 520, 2 S.Ct. 512) nor to one containing 59 counts. An indictment is not invalid just because it employs several counts to get forth the same offense in different ways.

Nevertheless, each count in an indictment stands or falls on the strength of its own allegation and cannot be aided by recitals in or inferences to be drawn from other counts in the indictment. UNITED STATES v. APEX DISTRIBUTING COMPANY, 148 F. Supp. 365. Thus the principle that each count stands or falls on the strength of its own allegations was enunciated in UNITED STATES v. HUGHES TOOL CO., 35 F. Supp 432;

> "The inferences from counts I and II are plausible, but as a matter of pleading, as each count stands or falls on

> the strength of its own allegation, inferences from other counts do not spell out a continuous offense when the count in question does not itself state facts sufficient to describe that type of an offense. 27 AM. Jur. 'Indictments and information' Section 192"

In an earlier case, JUSTICE STORY, speaking for the Supreme Court, stated that the burden of proof of offenses charged in an indictment rested on the Government.

> "Without question, it does in all cases where a party stands charged with an offense, unless a different provision is made by some statute, for the general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the Government itself to prove his guilt, before it is entitled to a verdict or conviction."

U.S. v. GOODING (1827, U.S.) 12 WHEAT 460, 471, 6 L ed 693. See also U.S. v. BUTLER (1877, CC SC) 1 HUGHES 457, F Cas. No. 14700.

It is significant to note that the federal courts give very full protection to the defendant in placing generally the burden of proof on the Government; and the Government is legally obliged, before conviction is obtained, to prove not only the essential elements of

the crime charged but also the individual counts brought against the accused. The accused is presumed innocent until the contrary is proved beyond reasonable doubt. Thus in 1835, JUSTICE McLEAN, speaking for the Supreme Court in U.S. v. THE BURDETT (1835, U.S.) 9 Pet 682, 691, 9 L.ed 273 stated:

> "No individual shall be punished for a violation of law which inflicts a forfeiture of property, unless the offense shall be established beyond reasonable doubt. This is the rule which governs jury in all criminal prosecution."

It is obvious from long established principles of our criminal jurisprudence, that before one accused of a crime could be convicted, his guilt of any offenses or counts charged should be proved beyond reasonable doubt. In the case at bar, the defendant-appellant together with co-defendant, STEPHEN LENT, was charged with 50 counts of using the mails in a scheme to defraud. During the trial there were a lot of testimony to indicate that thousands of mailers were sent out; but out of these thousands of mailers sent out by the defendants, there were only fifty (50) complaints that were brought forth in the indictment.

As has been pointed out, it was incumbent upon the Government to establish the guilt of the accused to each and every count beyond reasonable doubt to obtain conviction on all the fifty (50) counts. Nevertheless, out of those fifty (50) complaints, there were exactly eight (8) people who were produced by the prosecution as witnesses on their behalf. There was no testimony to establish the validity and the efficacy of the remaining forty two (42) counts alleged by the Government in the indictment; yet defendant-appellant was convicted on all the fifty (50) counts.

Assuming without conceding that the eight ( ) witnesses produced by the Government were defrauded by the defendant-appellant, it cannot be concluded that the other forty two (42) people who were not produced by the Government were also defrauded.

Since there was no evidence to establish defendant-appellant's guilt on the other forty two (42) counts, the conclusion must therefore be reached that the jury conviction of defendant-appellant on the other forty-two counts was against the weight of the evidence.

CONCLUSION

When the facts upon which defendant-appellant was convicted are closely scrutinized, the conclusion must be reached that; firstly, the acts charged under the indictment and the facts established at the trial do not constitute an offense within the meaning of Sections 1341 and 1342 of U.S.C.; secondly, the failure of the trial court to entertain defendant's motion for discovery, coupled with the admission of illegible Xerox copies, constitute a prejudicial error which deprived defendant-appellant's right to a fair trial; thirdly, the State conviction of defendant-appellant which pre-existed the Federal indictment constitute double jeopardy thereby preventing a trial on the same facts before the Federal courts; and finally, the failure of the Government to establish appellant's guilt to each and every individual count through testimony of persons named in the indictment constitute reversible error.

It is respectfully submitted upon the foregoing reasons that defendant-appellant's conviction was against the weight of the evidence and therefore must be reversed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

BEN ATUAHENE, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a party of the action and resides at Brooklyn, New York.

That on the 14th day of November, 1975, deponent served two copies of appellant's brief on appeal and one copy of appendix upon the U.S. Attorney's Office, Brooklyn, New York regarding the matter of PEOPLE v DOMINICK SEMINARA.

Sworn to before me,
this 14th day of November, 1975

ELLEN SPARACINO
Notary Public, State of New York
No. 41-7271
Qualified in Nassau County
Commission Expires March 30, 1977

Ellen Sparacino

Ben Atuahene
BEN ATUAHENE